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No. 94-0260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LYNN A. SCHEIB, BENJAMIN GROSSE, a minor, by LYNN ANN SCHEIB, his next friend, and CARL SCHEIB,

Petitioners,

v.

JOAN C. GRANT, BURTON F. GRANT, and DOROTHY B. JOHNSON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT DOROTHY B. JOHNSON IN OPPOSITION

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The Omnibus Crime Control and Safe Streets Act of 1968 ("Title III") provides that using or disclosing information which one had reason to know was originally obtained in violation of the statute, is actionable under the statute. Title III, however, contains an extension telephone exemption. 18 U.S.C. § 2510(5)(a)(i). The court of appeals for the Seventh Circuit held that reading the extension telephone exemption as a whole, does not subject parents to criminal

and civil penalties for recording their minor child's telephone conversations out of concern for the child's well-being. Hence, no unlawful use or disclosure violation can be established against father's attorneys or the minor child's guardian ad litem ("GAL"). The court rejected petitioners' contention that "in the ordinary course of its business" has strictly market-oriented connotations. The court of appeals also held that no genuine issue of material fact exists as to whether concern for the child's welfare was in fact the father's purpose in taping the telephone conversations between the child and the mother. The court further held that the district court did not err in holding father's attorneys and the GAL absolutely immune from damages liability under the Illinois Eavesdropping Act, 720 ILCS 5/14-1 *et seq.*, for using or divulging the recorded conversations in a manner intimately associated with the state court proceedings.

These holdings are unassailable, and review should be denied.

STATEMENT OF THE CASE

Lynn Scheib and James Grosse were divorced in 1982. Lynn was granted sole custody of their son, Benjamin, and James had visitation privileges. In February, 1991, Lynn filed her Petition for Removal of Benjamin to Pennsylvania. On February 11, 1991, the state court appointed Dorothy Johnson as GAL for Benjamin. The parents endeavored to settle the disputes existing between them, and on June 19, 1991, executed a written settlement subject to court approval. Prior to court approval, Lynn moved to Pennsylvania, and Benjamin remained with his father in Illinois for extended summer visitation.

While Benjamin was in Illinois with his father, the agreement of the parents broke down. Following telephone conversations with his mother, Benjamin became angry and upset and behaved in a negative and anti-social manner. Using a telephone answering machine attached to an extension telephone, father recorded two conversations between Benjamin and his mother. Neither Benjamin nor his mother had knowledge of the taping at the time of either conversation.

Father believed that the conversations revealed that Lynn was subjecting Benjamin to emotional distress and took the tapes to his attorneys. While engaged in a telephone conference with Joan Grant, attorney for James, the GAL overheard portions of a taped conversation and was advised that James now questioned Lynn's good faith intent to abide, in spirit and in keeping, with the June 19, 1991 written agreement.

After learning of the existence and content of the tapes from respondents, Lynn's attorneys filed a motion in limine as to the introduction of the tapes by James or the GAL. The state court ordered James and the GAL to file a memorandum of law in response to the motion in limine. The GAL opposed the motion in limine on the ground that the state court should hear any and all relevant evidence to determine the best interests of the child, whose interests are paramount.

Although the state court granted Lynn's motion in limine on August 2, 1991, the ruling was never reduced to a written order because the parents reached settlement as to the underlying case. On August 5, 1991, the state court entered the written settlement as an agreed order, retroactive to June 19, 1991, after allowing inquiry of Lynn as to her intention of prosecuting James in connection with the tape recordings. Contrary to petitioners' representation, the GAL

did not seek a release as to herself, nor did she present such an issue to the state court. Lynn subsequently filed this federal action against James' attorneys and the GAL alleging violations of Title III and the Illinois Eavesdropping Statute.

District court proceedings. Joan and Burton Grant filed a motion for summary judgment which asserted that Title III does not apply to situations where a parent intercepts a minor child's telephone conversation via the extension telephone exemption and that the facts of this case distinguish it from prohibited interspousal wiretaps. Relying upon *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 903 (1992) and *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977), the district court agreed that a broad reading of the § 2510(5)(a)(i) exemption for telephone equipment being used by the "subscriber or user in the ordinary course of its business" exempts a home extension telephone as well as a business extension telephone. The district court noted that the legislative history of Title III reveals that Congress did not intend to criminalize parental eavesdropping on a minor child via an extension telephone within the family home. Appendix to Petition (hereafter "App."), 28. The district court thus held that inasmuch as James' conduct was exempted from Title III, no violation for unlawful use or disclosure by the respondents can be established under Title III. App. 29.

Joan and Burton Grant's motion for summary judgment also asserted that their actions before the state court as advocates for James were entitled to the same absolute immunity from liability accorded defamation at common law. In addressing petitioners' claim that respondents had violated the Illinois Eavesdropping Act by using or divulging the recorded conversations, the district court assumed *arguendo* that the attorneys and GAL had violated the

statute, but granted summary judgment nonetheless because of the overriding public policy need for vigorous advocacy intimately associated with judicial proceedings. The rationale stated by the district court provides attorneys with immunity from liability under the Illinois Eavesdropping Statute for the same reason attorneys are absolutely immune from liability for defamatory statements that are reasonably related to the subject of litigation. App. 31.

The court of appeals' opinion. The court of appeals reviewed the district court's decision *de novo* and agreed that the question of interspousal wiretapping is not the issue presented by the facts in this case and affirmed that James' conduct did not violate Title III. App. 9. It noted that the decision of *Heggy v. Heggy*, 944 F.2d 1537 (10th Cir. 1991) *cert. denied*, 112 S.Ct. 1514 (1992), on which petitioners continue to rely, distinguishes interspousal wiretapping from a custodial parent tapping a minor child's conversations within the family home. App. 11-12 n.3 The court rejected petitioners' argument that the custodial status of a parent should be an outcome determining factor in applying the extension telephone exemption and focused instead on the need of parents, with whom minor children live, to obtain information concerning children's welfare. App. 10. The court further rejected petitioners' argument that the language of § 2510(5)(a)(i) "subscriber or user in the ordinary course of its business" should be confined strictly to commerce when a "subscriber" or "user" has a personal life as well as a commercial one. App. 12. The court of appeals found no genuine issue of material fact as to James' motive or intent in recording the conversations between Benjamin and Lynn, as the evidence showed that Benjamin was inexplicably upset after speaking with his mother. App. 14 n.5

The court of appeals extensively reviewed public policy concerns and the district court's application of the common

law rule prohibiting defamation actions against attorneys who make statements in relation to judicial proceedings to Illinois Eavesdropping Statute actions against attorneys who use or disclose information in a manner intimately associated with judicial proceedings. App. 16-17. As to James' attorneys, the court affirmed absolute immunity because there was no evidence of extrajudicial disclosure and their only disclosure to the court, opposing counsel and the GAL was intimately associated with the ongoing judicial proceeding. App. 18. As to the GAL, the court affirmed absolute immunity because her actions of listening to a portion of a tape during a telephone conversation which concerned Benjamin's welfare and later opposing the motion in limine was conduct intimately associated with her GAL function in the judicial process. App. 19.

Lynn petitioned for rehearing *en banc*. Contending that interspousal wiretapping is the issue, petitioners challenged the panel's decision as to the use of the extension telephone exemption to intercept a minor child's telephone conversation within the family home as being in direct conflict with decisions of the court and other courts of appeals. Petitioners also asserted that the panel overlooked a triable issue of material fact as to whether James recorded the telephone conversations because of concern for Benjamin, or because of his desire to obtain negative information about Lynn. Finally, petitioners asserted that the panel's granting of absolute immunity to James' attorneys and the GAL, while they functioned within the judicial process, was unprecedented and revolutionary. (The petition for certiorari has abandoned this argument.) No member of the court of appeals voted to rehear the case.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS' EXTENSION TELEPHONE EXEMPTION TO INTERCEPT A MINOR CHILD'S TELEPHONE CONVERSATION WITHIN THE FAMILY HOME IS CONSISTENT WITH DECISIONS OF OTHER CIRCUITS AND SHOULD NOT BE REVIEWED.

A. There Is No Basis To Review This Decision As An Interspousal Issue.

Petitioners assert that the recent case of *Thompson v. Dulaney*, 838 F.Supp. 1535 (D. Utah, 1993) wherein mother recorded telephone conversations between her young children and her estranged husband, is factually indistinguishable from this one and directly conflicts with the decision of the court of appeals. The petitioners' reliance is misplaced.

Thompson, was not a § 2510(5)(a)(i) extension telephone exemption case. It was a § 2511(2)(d) vicarious consent case. At the district level, the court simply ruled that Title III is inapplicable because the case was a "domestic dispute situation." Although, the district court stated that it relied on *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977), it did not otherwise address the case from the aspect of the extension telephone exemption detailed at page 678.

On appeal, the Tenth Circuit discussed its recent decisions of *Heggy v. Heggy*, 944 F.2d 1537 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 1514 (1992), that Title III applies to interspousal wiretapping within the marital home; and *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 903 (1992), that interspousal tapping is "qualitatively different" from parental tapping within the home, but did not address § 2510(5)(a)(i) in the body of its decision. While noting that not all wiretapping interceptions involving spouses will be actionable, the court enumerated three defenses and then added § 2510(5)(a)(i) as a

footnote. *Thompson v. Dulaney*, 970 F.2d 744 (10th Cir. 1992) at 748 n.5 The defense propounded by the mother in the court of appeals was a § 2511(2)(d) consent exception, and the court remanded because the district court had not ruled on that defense.

On remand, the extension telephone exemption was never argued and the district court never addressed § 2510(5)(a)(i) in denying the mother's renewed motion for summary judgment. Although the district court concluded that mother could vicariously consent for her minor children as a matter of law, there were factual issues as to whether she gave such consent, and if so, whether it was prior consent. Factually, the mother was temporarily residing with the parties' children in a home owned and occupied by her parents and the telephone equipment was also owned by the parents. Moreover, the facts developed on remand were that mother's tapping was personally motivated by her own insecurity, rather than by her exercise of parental responsibility.

In the present case, the court of appeals reviewed the district court's decision *de novo* and specifically delineated the issue in this case at the very outset of its discussion of Title III at App. 8:

> The issue in this case is not whether the defendants' activities fall under 18 U.S.C. § 2511(c) & (d), but rather whether James' conduct in taping the conversations between Benjamin and Lynn was exempted from Title III by virtue of the extension phone exemption of 18 U.S.C. § 2510(5)(a)(i).

The court of appeals considered facts that the recordings took place at a time when eleven year old Benjamin was properly in the care of his father at the residence owned and occupied by James and his family. Known to Lynn, James' home was equipped with extension telephones, a

cordless telephone and an answering machine. All of these electronic devices were commonplace, legal merchandise, owned and installed by James into his subscribed telephone service. Following telephone conversations with Lynn, James observed Benjamin become angry and upset and behaving in a negative and anti-social manner toward his father and siblings. Using his telephone answering machine attached to an extension telephone, James recorded two conversations between Benjamin and Lynn to determine Benjamin's distress and change in behavior. In doing so, the court of appeals believed James was responding as a concerned parent and placed significance on the fact that Benjamin appeared to be upset after speaking to his mother. App. 14. Benjamin admitted in an affidavit that he was "angry" and "upset" and cried, but attributed it to different causes.

The court of appeals finding of parental immunity from criminal and civil penalties for recording a minor child's telephone conversations within the family home and out of concern for the child's well being is consistent with the Tenth Circuit decisions of *Newcomb*, *supra*. 944 F.2d 1534 and *Heggy*, *supra*. 944 F.2d 1537. Nor should there be any ambiguity between *Newcomb* and *Thompson*. A careful understanding of each case makes it clear that *Newcomb* is a § 2510(5)(a)(i) extension telephone exemption case and *Thompson* is a § 2511(2)(d) vicarious consent case. Decisions can often be narrow and limited to the particular facts of the case, but that should not offer a basis for review.

B. The Qualitative Difference Of Parental Immunity Has Precedence.

This Court has on no fewer than three occasions denied *certiorari* in Title III domestic wiretapping cases.

The first was *Simpson v. Simpson*, 490 F.2d 803 (5th Cir. 1974), *cert. denied*, 419 U.S. 897 (1974). After their divorce, a former wife sued her former husband for intercepting her conversations within their marital home. The court of appeals for the Fifth Circuit did an exhaustive independent search of the legislative hearings preceding the passage of Title III. The court found that of the testimony about private surveillance, only a minor portion referred to the marital situation, and the Senate Report stated, "The major purpose of title III is to combat organized crime." *Id.* at 806. Although the court was not without doubts about its decision, and said so at page 810, it concluded that the statute is not sufficiently definite and specific to create a Title III action for the redress of a former wife's grievances against her former husband for intercepting conversations within their marital home. Apparently the first reported domestic wiretapping decision, *Simpson* in hindsight clearly places the Fifth Circuit in the minority of federal circuits holding that Title III does not apply to interspousal wiretapping.

Simpson is important, however, not as a minority interspousal opinion, but for the dicta contained in its consideration of Title III's applicability to the family home. The Fifth Circuit opined that Congress did not intend to prohibit a person from intercepting a family member's telephone conversations by use of an extension telephone in the family home, which exemption is set out at 18 U.S.C. § 2510(5)(a)(i). "I take it nobody wants to make it a crime for a father to listen in on his teenage daughter or some such related problem." *Id.* at 809 n.17 (quoting Prof. Herman Schwartz, who appeared for the A.C.L.U.) Moreover, the Fifth Circuit thought that the 18 U.S.C. § 2510(5)(a)(i) exemption is indicative that Congress's intention was to abjure from deciding the extent of privacy family members may expect within the home vis-a-vis each other. *Id.* at 809.

The next occasion was *Heggy v. Heggy*, 944 F.2d 1537 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 1514 (1992). While the parties were living together, husband, as Director of the Oklahoma Bureau of Narcotics instructed an agent of the Bureau to place a wiretap on the marital telephone and not to disclose its existence. Husband used the wiretap for three months to record the conversations of his wife, which conversations he catalogued and labeled by date and content. After the divorce, the former wife brought suit against her former husband under the civil damages provision of Title III. The Tenth Circuit joined the majority of federal circuits which apply Title III to interspousal wiretapping within the marital home. Although the court rejected the *Simpson* court's interpretation of Title III legislative history, it distinguished that criticism of *Simpson* from its approval of *Simpson*'s parental immunity from civil claims under Title III finding, i.e. the language describing congressional intent to abstain from interference in the interrelationship of family members in the context of the House Judiciary Committee Comment concerning the right of a father to supervise his teenage daughter. *Heggy*, *supra*, 944 F.2d at 1540 n.7

Although *Heggy* did not actually deal with an extension telephone exemption, *Heggy* is important because it recognized the distinction between interspousal wiretapping within the marital home and a parent's use of an extension telephone to intercept a minor child's telephone conversation within the family home, albeit in footnotes.

The last occasion was *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 903 (1992). A son, upon attaining majority, sued his mother, his grandfather and the county prosecutor for intercepting and recording his telephone conversations with his father after his parents were divorced. The son was a minor in the custody of his

mother and within her home when the conversations were taped without the knowledge of the son. One such conversation was recorded as the father instructed the son to set fire to the home where he resided with his mother. The mother told a fire investigator about the tapes and later turned them over to the county prosecutor. After the parents stipulated in juvenile court that the son was a child in need of care, the county prosecutor did not use the tapes in the juvenile proceedings, although she did review and evaluate the tapes. The issue was whether Title III applied to a situation where a minor child sues his custodial parent for telephone interceptions made within the family home. The Tenth Circuit found the *Newcomb* situation qualitatively different from the interspousal situation of *Heggy*. The court held that the interception of a family member's telephone conversation by use of an extension telephone in the family home is accorded a broad reading of the exemption contained in 18 U.S.C. § 2510(5)(a)(i). The court was not persuaded that Congress would exempt a business extension telephone and not a home extension telephone. Citing *Simpson*, *supra*, 490 F.2d at 809, the court quoted the language describing congressional intent to abstain from deciding the extent of privacy family members may expect within the home vis-a-vis each other in the context of the House Judiciary Committee Comment concerning the right of a father to supervise his teenage daughter.

The *Newcomb* case is closest to the present factual situation, and the only case in this grouping whose facts required this Court to consider parental interception of a minor child's telephone conversation within the family home. The precedent for parental immunity from civil claims under Title III, however, can be traced back to this Court's denial of *certiorari* in *Simpson*.

II.

THE COURT OF APPEALS DID NOT OVERLOOK THE ISSUE OF A MINOR'S RIGHT TO PRIVACY.

Although petitioners do not specifically address a minor's right to privacy, there is no issue to overlook. It is not implicit that an eleven year old boy is a teenager. Neither is it implicit that Benjamin's reproductive rights were involved. *See*, *Planned Parenthood v. Danforth*, 428 U.S. 52 (1978); and *Carey v. Population Services International*, 431 U.S. 678 (1977). Nor is it implicit that Benjamin was a mature minor entitled to refuse medical treatment. *See*, *In re E.G.*, 133 Ill.2d 98, 549 N.E.2d 322 (1989).

CONCLUSION

This respondent respectfully requests that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

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